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No. 811

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MAY 5 1961
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In the Supreme Court of the United States

OCTOBER TERM, 1960

AGNES KELLY O'TOOLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court (R. 32a-42a; Pet. App. 9-21) is not reported. The opinion of the Court of Appeals for the Second Circuit (R. 71a-79a; Pet. App. 22-30) is reported at 284 F. 2d 792. The orders of that court (R. 88a; Pet. App. 36) denying the petition for rehearing and the petition for rehearing *en banc* are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1960 (R. 71a; Pet. App. 22). Timely petitions for rehearing and for rehearing *en banc* were denied on January 3, 1961 (R. 88a; Pet. App. 36). The petition for a writ of certiorari was filed on March 23, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the two courts below erred in finding, on the basis of the particular facts involved in this action under the Tort Claims Act, that the government had successfully refuted the statutory presumption, under New York law, that its employee had permission to drive the government vehicle at the time of the accident.

STATUTES INVOLVED

The pertinent provisions of the Federal Tort Claims Act, 28 U.S.C. 1346(b), are set forth in the Appendix, *infra*, p. 13. Section 59 of the New York Vehicle and Traffic Law (McK. Consol. Laws, Ch. 71) is set forth at footnote 2, *infra*, p. 4.

STATEMENT

At approximately 2:00 P.M. on Friday, January 5, 1951, Andrew Cunningham and Theodore C. Daners, who were employed as investigators for the Alcohol and Tobacco Tax Unit of the Internal Revenue Service, returned to the Manhattan Office of the Unit

from an assignment at Liberty, New York (R. 54a; Pet. App. 24). They reported to their supervisor, Walter Carroll, at the office, bringing with them the baggage which they had utilized on the trip. According to the finding of the district court, based largely on the testimony of Carroll, the latter then granted Cunningham's request for the use of a government-owned automobile for the sole purpose of taking his luggage to his home, which was a twenty-five to thirty minute drive from the government garage (*ibid.*). The court found further, on the basis of Carroll's testimony,[1] that this permission to use the car was granted upon the explicit stipulation that it be returned to the government garage by 6:00 P.M. on the same day, immediately after the luggage had been deposited at Cunningham's home (*ibid.*).

Cunningham was off duty until the following Monday morning (R. 55a; Pet. App. 25). After leaving the office, he did not go home, but visited several bars, and, at approximately 6:30 P.M., met petitioner and two other friends in a bar (R. 52a, 55a; Pet. App. 24). The foursome spent several hours going from one bar to another, drinking, and "socializing" (R. 52a, 53a; Pet. App. 24). Still later in the evening, Cunningham and petitioner drove to a cabaret known as the Canary Cage where they drank and danced (R. 45a, 53a; Pet. App. 24). After leaving the Ca-

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[1] Daners had testified that his understanding was that the automobile was to be returned only on Monday morning (R. 32a; Pet. App. 11). However, Daners had apparently not been present during a portion of the conversation between Carroll and Cunningham (R. 33a; Pet. App. 12).

nary Cage, following a total of six to seven hours of touring bars and drinking, Cunningham started to drive petitioner home in the government-owned vehicle (R. 53a; Pet. App. 23). On the way, he ran the automobile up onto the sidewalk where it struck a telephone pole. Cunningham was killed, and petitioner was seriously injured (R. 46a; Pet. App. 23).

Petitioner brought this suit against the United States under the Tort Claims Act, 28 U.S.C. 1346(b) (App., *infra*, p. 13), to recover for her injuries. She sought to impose liability on the government for Cunningham's driving by virtue of Section 59 of the New York Vehicle and Traffic Law.[2] She urged that, under that statute, the government was liable for Cunningham's negligent driving simply on the ground that he had been driving a government-owned vehicle with the government's permission at the time of the accident, and wholly apart from principles of *respondeat superior*.[3] Petitioner pointed out further

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[2] Section 59 of the New York Vehicle and Traffic Law (McK. Consol. Laws, Ch. 71, amended, and recodified in 1959 as Section 388) provided:

> **Negligence of operator other than owner attributable to owner.** Every owner of a motor vehicle or motor cycle operated upon a public highway shall be liable and responsible for death or injuries to person or property resulting from negligence in the operation of such motor vehicle or motor cycle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission, express or implied, of such owner. * * *

[3] Petitioner contended that the statute goes beyond the principles of *respondeat superior* because it makes the owner of a vehicle liable for negligent driving by a person operating the vehicle with permission "in the business of such owner *or otherwise*." (Emphasis added).

that, in applying the statute, the New York decisions have recognized the existence of a presumption that a person operating a motor vehicle is doing so with the permission of its owner. Where ownership is established, the owner must, in order to escape liability, show by "substantial evidence" that the automobile was not being used with [illegible] permission.

The district court dismissed petitioner's complaint. Although it found that the accident had been caused by Cunningham's negligence (R. 49a; Pet. App. 23), it found also that petitioner had been guilty of contributory negligence, and had assumed the risk of driving with Cunningham "in his inebriated condition" (R. 40a, 55a; Pet. App. 23). The court found further that Cunningham had been acting outside of the scope of his employment at the time of the accident (R. 55a; Pet. App. 20).

On petitioner's appeal, the Court of Appeals for the Second Circuit affirmed. It stated that it found it unnecessary to review the district court's findings that petitioner had been contributorily negligent, and had assumed the risk (R. 72a; Pet. App. 23). The court pointed out that Cunningham had obviously not been engaged in government business at the time of the accident. It emphasized that (R. 73a-74a; Pet. App. 24):

> * * * the testimony of the various bartenders and that of other witnesses concerning the activities of appellant and Cunningham demonstrates beyond shadow of doubt that the was during the entire evening bent on his own pleasure and recreation and engaged on no government business whatever.

The court then reasoned that it did not have to pass on the question of whether the New York statute imposes liability beyond the scope of the doctrine of *respondeat superior*, and, if so, whether this broader concept of liability can be applied against the United States in a suit under the Tort Claims Act (R. 79a; Pet. App. 30).[4] It held that, in any event, the New York statute did not impose liability in the case at bar because, at the time of the accident, Cunningham had not been utilizing the automobile with the permission of the government. It pointed out that (R. 78a; Pet. App 29) "the New York Court of Appeals in *Chaika* v. *Vandenberg*, 1929, 252 N.Y. 101, held that there is no 'permission, express or implied,' if the car is used for a prohibited purpose." The court concluded that (R. 78a; Pet. App. 30):

> As the trial judge in the case before us, on substantial evidence found that Cunningham's permission to use the car was for a specific purpose and for a limited time and that he used it for a different purpose and for many hours after he was told to return it to the government garage, the New York law as above stated disposes of the case.

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[4] The government's contention was that, to the extent that it imposes liability on a person for negligent driving by an employee while the latter is not acting within the scope of his employment, Section 59 cannot be applied in a suit against the United States under the Tort Claims Act. See *infra*, pp. 9-12.

ARGUMENT

1. Petitioner correctly notes that, in *Williams* v. *United States*, 350 U.S. 857, this Court held that the question of whether a government employee is "acting within the scope of his office or employment", within the meaning of the Tort Claims Act, is to be determined with reference to the applicable state doctrine of *respondeat superior*. He then states that (Pet. 5) "[i]t is now necessary to determine whether this court's decision in the *Williams* case was intended to include state procedural law such as presumptions and burden of proof when such procedural law is outcome-determinative of the case at bar." Specifically, petitioner seeks resolution by this Court of the issue whether the presumption recognized by the New York decisions in applying Section 59 of the New York Vehicle and Traffic Law—that a person operating a motor vehicle is doing so with the permission of the owner—may be applied against the United States in a suit under the Tort Claims Act.

However, this question is not in dispute in this case. The United States has recognized fully that the presumption may, in a proper case, apply to it.[5] Contrary to petitioner's assertion (Pet. 7), the two courts below also recognized the applicability of the presumption. The district court noted at several

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[5] In the government's view, it is not inconsistent with the scheme of the Tort Claims Act to require the United States, as the owner presumably in possession of the facts, to rebut, by substantial evidence, a presumption to the effect that a person operating a government vehicle is doing so with the permission of the government.

points in its opinion the relevance of the presumption in applying the New York statute (R. 35a, 37a, 38a; Pet. App. 14, 16, 17). The court of appeals similarly made repeated references thereto, and explicitly held that, pursuant to New York law, petitioner could not recover because the government had produced substantial evidence to rebut the presumption (R. 77a-79a; Pet. App. 28-30).

Since it is clear that the courts below did recognize the applicability of the New York presumption, the actual thrust of petitioner's claim must be that these courts failed to give sufficient weight to the presumption in the face of countervailing evidence, and for that reason failed to apply the New York presumption correctly to the present circumstances. But, even if that were the case, review in this Court on writ of certiorari would not be warranted. The courts below purported to dispose of this case on the basis of local law. The question of whether they correctly applied that law to the particular situation is plainly not of certiorari caliber.

In any event, the record shows that the courts below concluded correctly that the government had produced substantial evidence to rebut the presumption in petitioner's favor.[6] As the district court em-

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[6] A succinct description of the presumption was set forth by the New York Court of Appeals in the case of *Chaika* v. *Vanderberg*, 252 N.Y. 101, upon which the court below relied. The court below pointed out that it had also applied this presumption in an earlier decision under the Tort Claims Act, *Mandelbaum* v. *United States*, 251 F. 2d 748 (C.A. 2). It had held in that case that the government had failed to establish by substantial evidence that a soldier's driving of

phasized, Carroll's testimony to the effect that he had given Cunningham permission to use the government vehicle solely for the purpose of depositing his luggage at home, and had stipulated that the car be returned at 6:00 P.M. on the same day, was unambiguous and vigorous (R. 35a, 36a, 37a, 41a, 54a; Pet. App. 14, 15, 16, 20).[7] Moreover, it is inherently unlikely that the government would have granted an employee permission to use a government vehicle for his own pleasure in an evening of heavy drinking. Accordingly, as the courts below properly found, the presumption was negated by substantial contravening evidence, and Section 59 of the New York statute was inapplicable.

2. There is an independent reason—not reached by the courts below—precluding imposition of liability on the federal government for Cunningham's private use of the government vehicle. Both lower courts found that, at the time of the accident, Cunningham was not acting within the scope of his employment for the government (R. 55a, 73a-74a; Pet. App. 20, 24), and the evidence supports such a conclusion beyond doubt. This finding, in our view, is independently dispositive of the case because Section 59 of the New York Vehicle and Traffic Law, to the extent

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an Army truck had been unauthorized. In the different circumstances presented in the case at bar, the court concluded that the government had produced substantial evidence to show that Cunningham did not have permission to use the government vehicle at the time of the accident.

[7] See also fn. 1, *supra*, p. 3.

that it imposes liability upon the owner of a vehicle without regard to the doctrine of *respondeat superior*, cannot be applied to subject the United States to liability under the Tort Claims Act.

The consent of the United States to suits based on tort claims is carefully defined by the language of the Act. Section 1346(b) (App., *infra*, p. 13) expressly limits the waiver of immunity to cases where damages have resulted from the wrongful act of a government employee "while acting within the scope of his office or employment." It is established that this language incorporates into the Act the common law doctrine of *respondeat superior* and limits recovery from the United States in tort actions to cases where that relationship has been established. See, *e. g.*, *United States* v. *Campbell*, 172 F.2d 500 (C.A.5), certiorari denied, 337 U.S. 957.

The court below, in declining to pass on the issue, suggested that this Court's decision in *Williams* v. *United States*, 350 U.S. 857, had left unresolved the question of whether state law can be applied against the United States under the Tort Claims Act to impose liability beyond the scope of the *respondeat superior* doctrine (R. 75a; Pet. App. 27-28). We believe that, on the contrary, this Court indicated in the *Williams* case that the liability of the United States cannot be so extended. The district court in that case had refused to apply a California "permissive use" statute (comparable to the New York statute relied on here) to hold the government liable for the reckless joy-riding of a soldier using a govern-

ment vehicle (105 F. Supp. 208, 209 (N.D. Cal.)). In this Court, the plaintiff adverted to such a broader basis for liability, and the government specifically asked the Court to reject the contention that this broader liability could be imposed. The Court's subsequent short *per curiam* order (350 U.S. 857) declaring, in effect, that the case was governed exclusively by the California *respondeat superior* doctrine necessarily rejected, we submit, the claim that statutes imposing liability without regard to the scope of employment are applicable to cases brought under the Tort Claims Act. Cf. *Dalehite* v. *United States*, 346 U.S. 15, 45.

The lower federal courts, also, have consistently held that the liability of the United States under the Tort Claims Act cannot be broadened by application of state "permissive use" statutes. *United States* v. *Hull*, 195 F. 2d 64 (C.A. 1); *United States* v. *Taylor*, 236 F. 2d 649 (C.A. 6), certiorari dismissed, 355 U.S. 801; *Hubsch* v. *United United States*, 174 F. 2d 7 (C.A. 5), certiorari dismissed, 340 U.S. 804; *Cropper* v. *United States*, 81 F. Supp. 81 (N.D. Fla.); *Long* v. *United States*, 78 F. Supp. 35 (S.D. Cal.). Indeed, in *United States* v. *Hull*, *supra*, Chief Judge Magruder, speaking for the First Circuit, specifically noted that Section 59 of the New York Vehicle and Traffic Law could not be applied to impose liability on the United States under the Tort Claims Act with regard to the negligent driving of an employee acting outside of the scope of his employment. Accordingly, petitioner's action against the United States, based

on the negligence of Cunningham while he was driving a government automobile for his own pleasure, was properly decided against her on this ground as well as upon the ground taken by the court of appeals.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1961

APPENDIX

The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides in pertinent part:

Section 1346. *United States as defendant.*

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *